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# **Exchange, unanimity and consent: a defence of the public choice account of power**

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**Abstract** *An enduring criticism of public choice theory is that it does not adequately address the question of power in contemporary capitalist societies. In particular it is argued that the exchange paradigm and the principle of unanimity lead to a conservative defence of the unequal and unjust status quo of such societies. These criticisms are often presented as unanswered and unanswerable. Indeed, public choice scholars have tended to pursue their own research agendas rather than engage such criticisms. This article seeks to make good this lacuna by providing a defence of the public choice account of power. It is shown that within the public choice approach the exchange paradigm and the unanimity principle serve as idealized models against which to judge real world institutional arrangements. As such, these models serve as a basis for critique of contemporary capitalist societies in which all individuals may be subject to predation as a matter of routine. It is shown that the public choice account of power addresses the legitimization and limitation of power, whereas the critics of public choice in effect propose to allocate power to those deemed deserving. Hence, the public choice approach provides a basis for a genuinely consensual politics and exposes the fact that alternative conceptions of politics are fundamentally non-consensual. On this basis it is concluded that the public choice account of power in contemporary capitalist societies is superior to that offered by its critics.*

**Keywords** Power · Exchange · Unanimity · Consent · Legitimacy · Constitutionalism

**JEL** D63, D70, H10, P16

## 1 Introduction

Power has been a principal concern of public choice theory. The foundational texts of public choice addressed the dynamics of majority rule (Black 1958; Buchanan and Tullock 1962; Buchanan 1975a), bureaucratic discretion in the democratic state (Niskanen 1971; Tullock 1965), the ability of special interest groups to secure rents and privileges from democratic processes (Krueger 1974; Olson 1982; Tullock 1967), and the necessity of framing constitutional rules to constrain the state (Buchanan and Tullock 1962; Buchanan 1975a). Yet an enduring criticism of public choice theory is that it does not adequately address the question of power in contemporary capitalist societies (Barry 1965: Chapter XIV; Dugger 1979; Lehner 1983; Samuels 1975; Shapiro 1996: Chapter 2; Udehn 1996).

This apparent paradox may be explained by the fact that while it is generally accepted that public choice provides an account of power that challenges the legitimacy of social democratic interventionism, critics of public choice argue that this account neglects crucial dimensions of power in contemporary capitalist societies. In particular, it is argued that (1) the public choice conceptualization of markets and politics as reducible to bilateral or multilateral exchanges between individuals ignores the power relationships inherent to both contexts and (2) the principle of unanimity that public choice theorists cite as the only legitimate decision-making rule for reform to the basic structure of society serves to privilege the status quo by effectively giving those who benefit from present arrangements the power of veto over reform proposals. It is said that for these reasons public choice theory leads to normative conclusions that legitimize the unequal and unjust status quo of contemporary capitalist societies and strike out the possibility that these inequalities and injustices may be ameliorated via standard social democratic mechanisms (Barry 1965: Chapter XIV; Dugger 1979; Lehner 1983; Samuels 1975; Shapiro 1996: Chapter 2; Udehn 1996).

These criticisms of public choice have been presented as unanswered and unanswerable. Barry (1965: 244), for example, wrote that Buchanan and Tullock were 'not in fact able to deal with [his principal objection to their thesis]. (They don't even try.)'. Similarly, Udehn (1996: 161) has argued that the public choice account of power is 'entangled in the most

glaring contradictions' that could only be resolved with the abandonment of its foundational assumptions and hence the disassembly of the public choice research program. Public choice scholars have tended to pursue their own research agendas rather than engage directly with these critiques. Buchanan and Tullock, for example, never responded directly to Barry's early critique of *The Calculus of Consent*. Consequently, this line of criticism has become established in the literature. Mueller's (2003: Chapter 6) magisterial overview of the field of public choice, for example, repeats the view that the unanimity principle privileges the status quo.

This article seeks to engage directly with and to answer these criticisms of public choice. In setting out the public choice position it will draw largely on the work of James M. Buchanan, the principal theoretician of public choice. It will be argued that at the heart of the issue are two incommensurable approaches to the question of power. Public choice theorists are concerned with how power can be legitimized and limited, whereas the critics of public choice are effectively concerned with who possesses power. Hence, public choice offers a solution to the problem of power grounded in genuinely consensual politics, whereas the critics of public choice in effect wish to be the arbiters of who should exercise power over whom.

The article proceeds as follows. Section 2 will introduce the public choice conceptualization of politics and markets as processes of exchange. It will set out the criticism that this exchange paradigm neglects the salient questions concerning power in markets and politics. Section 3 will present the principle of unanimity in public choice and the criticism that unanimity privileges the status quo in political decision-making by giving those who benefit from present arrangements the power of veto over reform. Section 4 will show that within public choice theory the exchange paradigm is in fact an idealized model intended to facilitate the evaluation of real world politics and markets. Section 5 will show that the principle of unanimity similarly serves as a normative standard and as such it may be used to expose the weak legitimacy of the status quo of contemporary capitalist societies in which institutions do not enjoy unanimous consent. Finally, Section 6 compares the conceptualizations of power utilized by public choice theorists and their critics and concludes that the public choice approach is superior as it offers a means of legitimizing and

limiting power, rather than producing arguments for the transfer of power to those deemed worthy.

## **2 The exchange paradigm in politics and markets**

Public choice is methodologically individualist, which leads to a conceptualization of economic and political processes in terms of the actions of individual men and women. A market economy is modelled as a series of bilateral, voluntary exchanges through which individuals exchange goods and services that they value (or the ability to purchase valued goods and services) for goods and services that they value more (or the ability to purchase more-valued goods and services). In this sense, market exchanges are perceived to require the consent of all participants and will only take place when Pareto-improvements are supplied to the exchanging parties (Brennan and Buchanan 1985: Chapter 2; Buchanan and Tullock 1962: Chapter 1).

Similarly, 'the whole enterprise of politics can be viewed only as a complex many-person system of exchanges or contracts', in which, 'Individuals must be conceived to join together to explore and ultimately to agree on the establishment of collective entities or arrangements that prove mutually beneficial' (Brennan and Buchanan 1985: 25). Hence, it is assumed that legitimate political decisions supply Pareto-improvements akin to those supplied by private markets, or that political decisions that do not supply Pareto-improvements reflect deviations from unanimity agreed by all at the constitutional level of decision-making. Legitimate politics is therefore assumed to be a consensual enterprise (Brennan and Buchanan 1985: Chapter 2; Buchanan 1975a: Chapter 4).

The definitive example of the public choice view of politics as a process of exchange is the unanimous agreement to a social contract that establishes political rights and sets overarching laws and rules to govern the future conduct of politics. A social contract, it is argued, should not be understood as being imposed from the top-down by an almighty sovereign, nor as the result of the actions of one powerful group imposing its will on others. Rather, a social contract should be modelled as the result of multilateral agreement among individuals (Brennan and Buchanan 1985: Chapter 2; Buchanan 1975a: Chapter 4).

It is in the context of this view of politics and markets as processes of exchange that Buchanan has written that 'the simple exchange of apples and oranges between two traders' is the 'institutional model' that serves as 'the starting point for all that I have done' (Buchanan 2007: 17). A market economy is understood to be ultimately reducible to an exchange of apples and oranges between two traders, just as political institutions are said to be ultimately reducible to the decision of the relevant individuals to formally recognize and respect one another's rights. In the words of Vanberg (2004: 154), the market may be understood in terms of 'mutual gains from trade' and politics may be understood in terms of 'mutual gains from joint commitment'.

This conceptualization of politics and markets as processes of exchange has generated substantial criticism on the grounds that it ignores important questions about power in economic and political contexts, particularly when applied to contemporary capitalist societies. According to Udehn (1996: 161): 'Public choice, at least as a theory of exchange, is... devoid of a theory of power'.

In terms of markets, public choice theory is said to repeat the fallacy of neo-classical economics in seeing market exchange as a voluntary process undertaken by fundamentally free and equal individuals. It is argued that the model of a market economy as 'a spontaneous, generally beneficent, powerfully productive economic system, analyzed in terms of impersonal market forces' neglects the fact that underlying 'the economics of individuals voluntarily choosing from among the opportunities available to them' is in reality 'a system of mutual coercion based on relative power' (Samuels 1973: 123).

A market economy is said to be a system of power in the sense that underlying each bilateral exchange is a set of property rights established via a political process that effectively grants one individual or group power over other individuals or groups. Samuels (1971) illustrated this point with the example of the legal case of *Miller et al. v. Schoene* in which the owners of a plot of red cedar trees located next to an apple orchard in Virginia sought to overturn the decision of the state legislature to grant the state the power to destroy without compensation red cedar trees infected with cedar rust, a plant disease that

threatened apple crops. The red cedar owners argued unsuccessfully that this legislation gave the state the power to destroy their property without compensation and therefore was an infringement of their property rights.

Samuels (1971: 438) argued that this example illustrated 'the ineluctable necessity of choice on the part of government': the state's action against the red cedar owners destroyed their property rights, but if the state had not acted against the red cedar owners its inaction would have destroyed the property rights of the apple tree owners whose crop would be ruined by cedar rust. For Samuels, this example exposed the fallacy of the notion of neutral laissez-faire government. Action and inaction by the government involved the enforcement of the property rights of some individuals and the concomitant destruction of the property rights of others.

Samuels' example highlights the fact that market exchanges between individuals necessarily require prior processes that establish (1) how something comes to be owned and (2) what is owned by different individuals, groups or organizations (Vanberg 2004: 157). On this basis, it is argued that a market economy is more than simply a myriad of bilateral, voluntary exchanges between individuals. A market economy is said to involve a prior political process that has coercive implications. The decision, for example, that a particular economic resource is owned by a particular individual may mean that other individuals have no plausible alternative but to work for that person. An attempt to challenge or change those property rights may incur the coercive power of the state. For this reason, it is argued that at the most fundamental level a market economy should be understood as a legal-economic nexus, rather than a 'purely' economic system. In the words of Samuels (1971: 450), a market economy should properly be conceptualized 'in terms of the structure of power, the capacity to visit injury, and the system of mutual coercion'.

Furthermore, it is argued that public choice theorists extend the error of conceptualizing economic relationships as free from power into the realm of politics. According to Udehn (1996: 162): '*Public choice* is incapable of dealing with power' because 'it relies on the assumption that politics can be analyzed as exchange between *free and equal* partners'.



Hence, Shapiro has argued that public choice theory suffers from a 'reductionist fallacy' in which politics is shrunk to utility-maximizing exchanges between individuals, when in fact politics very often concerns questions of principle where there are no substitution alternatives like those that can be found in economic markets:

Although it is characteristic for economists to assume all disutilities to be compensable... in politics we cannot assume this... The substitution equivalent for those who opposed desegregation probably did not exist. Where votes are judgments about what public policy ought to be, the [public choice] theory will often fare badly. (Shapiro 1996: 20)

It is argued that politics should more accurately be conceptualized as a choice between incommensurable alternatives rather than a process of exchange where mutually advantageous Pareto-improvements are always possible. Politics, it is argued, often concerns conflict between competing values or interests, such as those of capital and labor, exploiter and exploited, or red cedar and apple tree owner, and in such instances it is said to be necessary to make a normative choice between right and wrong.

### **3 Unanimity, the status quo and power**

The conceptualization of politics and markets as processes of exchange derives much of its normative power from the assumption that such exchanges can take place only with the consent of all parties and this ensures that such exchanges produce Pareto-improvements and are therefore welfare-enhancing. Here, the exchange paradigm draws on the classic work of Knut Wicksell (1896) in proposing unanimity as the ideal political decision-making rule (see also Wagner 1988). In the words of Buchanan (1968a: 10): 'only [where there is] unanimous consent of all parties can we be absolutely assured that the total welfare of the group is improved. As applied to politics, the rule of unanimity is equivalent to the Pareto criterion for judging a potential change to be optimal'.

In the absence of unanimity, political decisions will create winners and losers and therefore can be said to be welfare-enhancing only if we are willing or able to judge that the gains of

the winners outweigh the losses of the losers – as in the standard application of Kaldor-Hicks efficiency. Such a judgement, of course, could not be reconciled with the individualist postulate at the heart of the public choice approach in which each individual is regarded as an end in themselves whose utility cannot be traded-off against the utility of others. Public choice is fundamentally subjectivist in that it is believed that only the choosing individuals can judge whether different economic and political trade-offs are likely to enhance their well-being (for example Buchanan 1975a; Buchanan 1975b; Buchanan 1977a; Buchanan 1977c; Vanberg 2004).

Although unanimity is posited as an ideal standard of political decision-making, it is nevertheless recognized that it imposes high decision-making costs given that, ‘A single negative vote blocks a proposal, even if all others in the group approve it’, so that, ‘Practically speaking, the rule of unanimity would result in few, if any, decisions being made’ (Buchanan 1968b: 94).

The public choice solution is to use different decision-making rules for different political decisions. Foundational, constitutional agreements should be unanimous and such agreements will specify the decision-making rules to be used below the level of constitutional choice. Hence, it is acknowledged that some departure from the principle of unanimity is necessary to facilitate the collective decision-making required to overcome public goods and free-rider problems in any advanced society. But such departures from unanimity can be legitimized only by the agreement of the relevant parties. It is presumed that people will wish to agree more inclusive decision-making rules for more contentious decisions, mediated to some extent by the size of the relevant population (Buchanan and Tullock 1962; Buchanan 1968b: Chapter 3; Buchanan 1975a: Chapter 3).

Within the public choice framework what Rawls (1971) termed ‘the basic structure of society’ – the rules that govern the major social institutions that may determine the distribution of benefits and burdens and play a large part in determining people’s life chances – should be the subject of unanimous constitutional agreement. The standard operation of the social democratic welfare state in which less than unanimous decision-making frames redistributive policies is therefore judged to be an illegitimate over-reach of

post-constitutional, majoritarian politics into what should be the unanimous, constitutional sphere – assuming, of course, that the operation of such a welfare state has not been unanimously agreed at the constitutional level (Buchanan 1977b).

Critics of the public choice approach, however, have argued that the application of the principle of unanimity to contemporary capitalist societies in Buchanan's work ignores the reality of the inequalities of wealth and power within such societies. The requirement that political change is unanimously agreed would seem to assign legitimacy to the status quo, but if presently existing institutional arrangements reflect long-standing inequalities that did not arise via unanimous agreement then it is argued that it is hard to see – on public choice terms – on what basis such legitimacy has been obtained:

The authors' construction clearly depends heavily on the existence of some status quo on which everyone agrees; otherwise we have no base-line against which to measure the 'changes' which are supposed to require unanimity... An obvious objection is that it would be impossible to get unanimous agreement on any particular initial distribution of property. (Barry 1965: 243-44)

The requirement that any movement away from the status quo must have unanimous consent is therefore said to give the status quo special status over alternatives by virtue of the fact that it happens to exist, even if, in reality, it did not come about via unanimous consent, or 'whatever contractualist element these arrangements once exhibited has receded into the mists of time' (Shapiro 1996: 229).

Furthermore, Samuels (2004: 239) argued that individual perceptions of the costs and benefits of proposed institutional reforms will inextricably be bound up with existing property rights and the price structure generated therein. If one individual or organization has monopolistic control of a particular resource, for example, other people's perception of its value and the compensation due as part of a proposed unanimous transition to more competitive arrangements could be inflated. Hence, even those individuals who do not obviously have a vested interest in the status quo may find their evaluation of proposals for political reform distorted by existing property rights.

The principle of unanimity is therefore said to give those individuals who benefit from present arrangements unwarranted power. Under conditions of unanimity, 'The abolition of slavery is blocked by the slave owners, the redistribution of income by the rich', so that, 'If one group achieves a larger than average share of the community's income or wealth via luck, skill, or cunning, the unanimity rule ensures that this distribution cannot be upset by collective action of the community' (Mueller 2003: 143-44).

In the context of the inequalities of wealth and power that exist in contemporary capitalist societies it is argued that majoritarian agreement is preferable to unanimous agreement because the former enables the political process to be used to ameliorate historic inequalities and injustices. In the words of Shapiro (1996: 16-7), majority rule may be judged preferable to unanimity because, 'In a society based on hereditary accumulations of wealth and political privilege, majority rule was designed precisely to dispossess a minority of ill-gotten gains'.

As such, unanimity is said to be an inherently conservative principle that serves to privilege the status quo and thwart any reform proposal that threatens to make any one individual worse off – even if that individual is, for example, a slave owner or the inheritor of the gains of predation. The unanimity principle is therefore said to be in effect a form of minority rule which should be judged inferior to majority rule, particularly given that the minority likely to benefit from the requirement of unanimity will be a political and/or economic elite who have acquired their privileged status via underhand means at some point in the past (Barry 1965: Chapters XIV and XV; Rae 1975; Samuels 2004; Shapiro 1996: Chapter 8).

The unanimity principle in public choice is therefore said to legitimize the status quo of contemporary capitalist societies by requiring that any change to the basic structure of society has unanimous consent. While the use of non-unanimous decision-making in order to overcome free-rider problems in the supply of public goods may be agreed at the constitutional level, such unanimous agreement would seem to be unobtainable for standard social democratic interventions, such as the use of the tax and benefit to redistribute income and wealth. On this basis it is argued that the public choice approach

legitimizes the status quo of contemporary capitalist societies and simultaneously rules out the use of standard social democratic policies to ameliorate the inequalities and injustices that are said to permeate such societies.

#### **4 Power, markets and the exchange paradigm as a normative ideal**

For public choice theorists, the notion that politics and markets should be understood in terms of voluntary, bilateral or multilateral exchanges is intended to be a normative ideal, not a realistic description of presently existing politics or markets. It is contended that economic and political decision-making *should* be processes of exchange within which people seek to reconcile often conflicting and incommensurable ends to mutual advantage. If economic transactions or political decisions cannot be shown to provide Pareto-improvements (or to be unanimously agreed deviations from the requirement to provide Pareto-improvements) then their legitimacy is to be questioned in terms of the basis upon which those who do not benefit can be assumed to consent to the decision or transaction (Buchanan 1962; Buchanan 1966; Buchanan 1975a: Chapters 3 and 4).

It must be asked, however, whether this idealized model of 'free' markets disguises or ignores the political recognition and/or allocation of property rights that must precede any market transaction. It may be argued that the ideal of a genuinely free market neglects (what Samuels termed) the system of power underpinning a market economy.

Buchanan undoubtedly accepted that every market transaction requires a prior political process that establishes how something comes to be owned and what is owned by different individuals, groups or organizations. For Buchanan, however, it was possible to conceive of such a process taking place with the unanimous consent of all parties, even beginning from an unequal and unjust starting point and leading to an agreement that formalizes rather than removes those initial inequalities and injustices.

Buchanan (1975a: 65) represented the choice each individual faces between the state of nature and the social contract in a formal model of a two-person Prisoner's Dilemma shown in Figure 1. In this model, two unequal people, A and B, each face two possible behavioral

choices: to respect or not respect the rights of the other. The four cells of the model each show the different pay-offs that A and B receive in each of the four possible outcomes. In Cell I, both A and B choose to respect the rights of the other and here A, the stronger of the two, receives a pay-off of 19 and B, the weaker, receives a pay-off of 7. However, if B chooses not to respect A's rights by taking from him or her via predation, while A continues to respect B's rights, then B receives an increased pay-off of 11, while A's pay-off is reduced to 3. If, on the other hand, A chooses not to respect B's rights by taking from him or her via predation, while B continues to respect A's rights, then A receives a much greater pay-off of 22, while B's pay-off is reduced to 1. If both decide not to respect the other's rights, then Cell IV shows the pay-offs to be 9 for A and 2 for B.

[Figure 1 about here]

It should be clear that the outcomes in Cells II and III are inherently unstable because Cell IV, where neither respects the other's rights, offers a better pay-off for the loser in Cells II or III. For this reason, any movement into Cells II and III can be assumed to lead automatically to Cell IV. The real choice that the two parties face is therefore between Cells I and IV. Cell I, then, represents the social contract and Cell IV represents the state of nature. The model shows that for strong A and for weak B, the social contract is preferable to the state of nature. Hence, the strong and the weak will both gain by agreeing to respect the rights of the other and enter into the social contract.

The formal model of the agreement of a social contract presented in Figure 1 does not rely on people being equal in terms of resources, status or power. On the contrary, according to Buchanan (1975a: 54), 'even among men who are unequal, a structure of legal rights can be predicted to emerge, a structure that retains characteristic elements that we associate with the precepts of individualism'. It is argued that even people who are materially unequal will choose to enter into a social contract that does not alter the basic facts of their inequality post-agreement, but, on the contrary, recognizes and protects their basic rights, including their 'right' to unequal holdings that may be the result of predation.<sup>1</sup>

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<sup>1</sup> It should be noted that in *The Calculus of Consent*, Buchanan and Tullock (1962: 80) argued that constitutional agreement requires people to enter the constitutional process as 'equals' in terms of status and

Buchanan's account of the social contract is intended to show that it is possible to conceive of the unanimous agreement of a regime of unequal private property rights and that this conceptual model can serve as a normative ideal. Whereas Rawls (1971) famously removed social and economic inequalities from his conceptualization of the social contract that was to take place under a veil of ignorance in the Original Position, Buchanan sought to show that unequal people can be anticipated to unanimously reach a foundational political agreement that formalizes rather than removes their inequalities.

For Buchanan, the fact that underlying the bilateral exchanges that constitute a market economy may be the formalization of an unequal distribution of property rights and hence power does not make those exchanges illegitimate or involuntary. Rather, it is said to be at least possible to conceptualize that such inequalities can obtain legitimacy via unanimous political agreement. For Buchanan, a free market is an economic system in which the underlying political structure of property rights and power has been unanimously agreed, not an economy in which each individual possesses equal resources or power, or where there is no underlying political structure of property rights and power (if either were conceptually, let alone practically, possible).

Buchanan's public choice theory does not neglect or ignore the question of power in a market economy. Rather, Buchanan's work is intended to highlight the political origins of that power in the formal agreement of the rules that determine how something comes to be owned and what is owned by different individuals, groups or organizations. Hence, Buchanan's work provides a conceptual account of how and why the asymmetries of power that underpin and/or result from market transactions may be deemed legitimate.

The contractarian approach is not intended to imply that real world institutions came into being via unanimous agreement and thereby can be imagined to have legitimacy. As Buchanan (1975b: 17) noted, 'factually and historically, the "social contract" is

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therefore 'our analysis of the constitution-making process has little relevance for a society that is characterized by a sharp cleavage of the population into distinguishable social classes or separate racial, religious, or ethnic groupings'. Buchanan clearly revised this view in his later work, notably *The Limits of Liberty* – see, for example, the discussion of the emergence of slavery (Buchanan 1975a: 59-60).

mythological... Individuals did not come together in some original position and mutually agree on the rules of social intercourse', and even if at some point in history a social contract had been agreed, such an agreement 'could hardly be considered to be contractually binding on all of us who have come behind'.

Rather, the contractarian approach is intended to be a normative ideal that shows (1) how we can move from a status quo absent a constitutional order that ensures rights are respected to one in which rights are respected and political institutions have legitimacy on the basis of the unanimous consent of the governed and (2) how modifications to existing property rights necessitated by exogenous shocks can similarly take place via unanimous agreement (Buchanan 1972; Buchanan 1975b).

In the case of Samuels's (1971) example of the red cedar and apple tree owners presented in Section 2, Buchanan (1972: 441) noted that this legal case occurred against the background of pre-existing property rights agreed prior to the onset of red cedar rust that effectively 'did not allow the apple grower to destroy diseased cedar trees on neighboring lands' and 'allowed the red cedar owners to grow diseased trees safe from molestation by damaged apple growers'. In the wake of the onset of cedar rust the apple orchard owner successfully used the legal process to have the relevant property rights adjusted in his favor. Buchanan argued, however, that a mutually advantageous agreement that internalized the harm caused by the cedar rust along the lines classically envisaged by Coase (1960) could have been reached without the necessity of the imposition of an exclusive '*either/or*' solution via a legal-political process. Buchanan (1972: 442) wrote: 'A region of potential mutual gain existed, and bargains might have been struck which would have moved the solution towards the efficiency surface'.

Samuels, then, presented one possible solution to the problem caused by the onset of cedar rust as the only possible solution and then drew general conclusions from this vis-à-vis the inevitability of certain types of political intervention in economic processes. In Buchanan's (1972: 441) words: 'Samuels appeals too readily to state decision-making which, in its very nature, forestalls the exchange or market-like pressures towards internalizing the



interdependencies that may arise as exogenous elements to modify the overall social environment’.

In fact, any bilateral agreement between the two parties would have been a legitimate outcome given that Samuels did not claim that there was an objectively just solution to the problem caused by the onset of cedar rust. The threat that in the event of failure to reach an agreement the state would adjudicate, and by so doing effectively destroy the property rights of one party, might be assumed to provide an incentive to the two parties to reach a mutually advantageous agreement. Hence, Samuels’s example does not refute Buchanan’s thesis that a system of unequal, but mutually-agreed, property rights can be legitimate and this can underpin a market economy that thereby derives similar legitimacy. On the contrary, the case of *Miller et al. v. Schoene* appears to support Buchanan’s position that legitimate property rights originate via multilateral agreement between individuals, rather than via external arbitration.

As Boettke (2001) has described, Buchanan’s project should be properly understood as an attempt to politicize political economy by engaging with the normative foundations of contemporary capitalist societies largely neglected by mainstream neo-classical economists. Even the simple bilateral exchange of apples and oranges between two traders requires prior agreement as to how property rights in apples and oranges are to be established that requires a political process. Buchanan’s work shows that an appreciation of the political foundations of a market economy does not expose a market economy to unanswerable claims of illegitimacy. Rather, it raises the question of whether those political processes command the consent of the relevant parties.

## **5 Unanimity and the status of the status quo**

The place of the principle of unanimity at the heart of the public choice approach set out in Section 3 may give the impression that public choice provides a defense of the status quo of contemporary capitalist societies. As Buchanan (1975c: 27) recognized:

I realize that my own position necessarily makes it seem that I am defending the status quo, and in a sense, I am doing so, not because I like it, I do not... But my defense of the status quo stems from my unwillingness, indeed inability, to discuss changes other than those that are contractual in nature.

As Vanberg (2004) has described, however, it is important to draw a distinction between the status quo as the inevitable starting point of any change and the normative status of the status quo. Hence, Buchanan's defence of the status quo does not begin from a normative judgment that present institutional arrangements are desirable, but rather from the practical recognition that, 'In a very real sense, the starting point is always the *status quo*, and proposals for improvement must be informed by this existential reality' (Buchanan 1975d: 124).

The basic fact that the status quo exists means that change that has the consent of all participants must be approached in terms of approval for movement away from the status quo. In this sense, the status quo does have a privileged position in any theory of consensual politics simply and only because it is the here and now from which we must start. Hence, Samuels (2004) was correct to note that the distribution of property rights in the status quo will inform people's evaluations of alternative institutional arrangements.

As Vanberg (2004: 158) has observed, however, the critics of 'the alleged conservative bias of contractarian constitutionalism' really object to 'the contractarian norm that change ought to be *contractual*, based on the consent of the parties concerned', rather than the fact that contractual change begins from the status quo – because *all* change *must* begin from the status quo. Hence, the argument for the status quo as the inevitable starting point of change and the argument for contractarianism are distinct: 'From the fact, indisputable as it surely is, that we start from here one cannot conclude per se that we should proceed from here in a peaceful, contractual manner only' (Vanberg 2004: 158).

The critics of public choice do not object to unanimity per se, but rather to the notion that *only* unanimous change can be legitimate. The claim that from what might be considered an unjust starting point, such as a set of property rights derived from the legal recognition of

the gains of predation, only unanimous change is possible, is the real point of departure between public choice theory and its critics.

Here it is no doubt relevant that the contractual political theories set out by Rawls (1971) and Nozick (1974) both utilized the principle of unanimity only from starting points that were constructed as just. As already noted, for Rawls (1971) the unanimous agreement of a social contract required the contracting parties to assume a veil of ignorance so that they did not possess knowledge of the subsequent social or economic statuses and therefore could not bargain for a set of institutional arrangements that maintained or privileged their own position. Similarly, Nozick's (1974: 160-4) entitlement theory of justice elucidated in the Wilt Chamberlain example began from an unspecified starting point that was considered just (to be imagined by the reader) from which a new and just distribution of income and wealth was then shown to emerge via a series of just steps.<sup>2</sup> The Wilt Chamberlain example depends on the starting point being considered just – if this is not the case then the question of the rectification of past injustices arises. For Rawls and Nozick, something akin to Buchanan's approach was legitimate *only if* combined with a starting point that was just; neither would apply the principle of unanimity to a starting point that was unjust.

Buchanan, however, argues that unanimity is the only legitimate basis for political agreement even from an unjust starting point. Hence, in Buchanan's model of the social contract set out in the previous section, the starting point of political agreement was a state of nature in which the strong were able to undertake successful predation against the weak and thereby obtain an unequal share of resources. Even from this starting point, Buchanan modeled the unanimous agreement of a social contract.

Buchanan's conceptual account of the social contract set out in the previous section should also not be read across to ascribe unanimity or legitimacy to the status quo of contemporary

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<sup>2</sup> Nozick (1974: 160-4) illustrated his entitlement theory of justice with the example of the wealth acquired by the basketball star Wilt Chamberlain in a fictional scenario. Taking as a starting point a distribution of resources that is considered just, which Nozick named  $D_1$ , it is supposed that basketball fans pay 25c directly to Chamberlain (in addition to the standard ticket price) to watch him play. If one million people come through the turnstiles during a season, Chamberlain will acquire additional income of \$250,000. Consequently, a new distribution of resources has emerged, which Nozick named  $D_2$ . For Nozick, this new distribution of resources must be considered just because it has arisen via a series of just steps.

capitalist societies. On the contrary, Buchanan has described contemporary capitalist societies as examples of 'constitutional anarchy', in which nominal constraints on government exist, but these 'constraints' do not provide protection against predation and, moreover, government is the principal means via which predation is undertaken. It is argued that in the absence of a unanimously agreed social contract that imposes effective constitutional constraints on government it is in fact impossible to escape the state of nature – and this is what is seen in contemporary capitalist societies (Buchanan 1975a: Chapter 9; Brennan and Buchanan 1985: Chapters 6, 7 and 8).

Indeed, a central contribution of public choice theory has been to analyze the workings of 'constitutional anarchy'. It is argued that majoritarian political institutions contain an inherent potential for one group to exploit others via the standard mechanisms of social democracy, such as the tax and benefit system, economic regulation and intervention, and the allocation of rents and special privileges (Brennan and Buchanan 1985; Buchanan and Tullock 1962; Buchanan 1975a; Buchanan and Congleton 1998).

According to Buchanan (1975a: 14), in the contemporary United States, 'the range and extent of federal government influence over individual behavior depend largely on the accidental preferences of politicians in judicial, legislative, and executive positions of power'. It is a society in which the preferences of the minority of the population able to capture and control the political process determine the actions of the state. Consequently, 'Increasingly, men feel themselves at the mercy of a faceless, irresponsible bureaucracy, subject to unpredictable twists and turns that destroy and distort personal expectations with little opportunity for redress or retribution' (Buchanan 1975a: 14).

Public choice theory, then, provides a critical analysis of contemporary capitalist societies. For Buchanan (1978: 52), the United States was founded by a political agreement that had many of the characteristics of unanimous consent, but by the late-twentieth century 'the American constitutional structure [was] in disarray; the constraints that "worked" for two centuries seemed to have failed', as majoritarian, non-consensual politics returned the country to something akin to the state of nature.

It is often assumed that the public choice critique of contemporary social democratic politics leads to a crude argument for laissez-faire that effectively reinforces the property rights of the rich and powerful (for example Barry 1965: Chapter XIV; Dugger 1979; Udehn 1996: Chapter 4). In reality, however, the public choice critique of non-consensual politics only leads to an argument for consensual politics – politics founded upon unanimously agreed rules.

From a public choice perspective, those who would argue for new constitutional rules to reduce the ability of the state to engage in redistributive politics must also address the willingness of the poor to accept the entrenchment of existing property rights that would follow from such restrictions on government action:

[H]ow can the rich man (or the libertarian philosopher) expect the poor man to accept any new constitutional order that severely restricts the scope for fiscal transfers among groups? Consensual support for such restriction could scarcely be predicted to be forthcoming. (Buchanan 1975a: 178)

Indeed, some members of contemporary societies may believe they have less to lose from a return to the state of nature than from the agreement of a social contract that more firmly entrenches existing property rights. For Buchanan, this suggests the necessity of a renegotiation of existing property rights in a 'constitutional revolution'. It is argued that a one-off transfer of wealth from the rich to the poor may be necessary to facilitate the agreement of a new constitutional compact:

The rich man, who may sense the vulnerability of his nominal claims in the existing state of affairs and who may, at the same time, desire that the range of collective or state action be restricted, can potentially agree on a once-and-for-all or quasi-permanent transfer of wealth to the poor man, a transfer made in exchange for the latter's agreement to a genuinely new constitution that will overtly limit governmentally directed fiscal transfers. (Buchanan 1975a: 178)

It is possible, according to Buchanan (1975a: 178-80), to conceptualize a multilateral agreement in which the rich agreed to assign some of their assets to the poor in return for limits to the future use of the tax and benefit system to transfer income and wealth from the rich to the poor. It is argued that taking into account the removal of the deadweight losses of taxation, the possibility that the rich may fear even more punitive taxation in the future, or the possibility that both rich and poor may fear a non-constitutional revolution during which all property rights would be disregarded, a series of mutually advantageous exchanges that could form the basis of the unanimous agreement of a new social contract could be anticipated (Buchanan 1975a: Chapter 9; Buchanan 1975d; Buchanan 1977d; Brennan and Buchanan 1985: Chapter 9).

It should be emphasized that Buchanan does not advocate a top-down reassignment of property rights by government. On the contrary, it is argued that the imposition of a new constitutional order on one part of society by another would only replicate the problems of contemporary majoritarian democracy in which one group imposes its wishes on the rest of society. For Buchanan (1975a: 169), 'Little, if any, improvement in the lot of modern man is promised by imposition of new rules by some men on other men'.

Two principal criticisms of Buchanan's advocacy of constitutional revolution have been advanced. First, it has been argued that the diminution of property rights via the tax and benefit systems of contemporary welfare states is an appropriate and just response to the distributional outcomes produced by markets and therefore it would be wrong to seek to thwart such redistribution. In the words of Dugger (1979: 376), what has occurred is that 'collective action has taken these rights away from former masters and given them to the common man'.

From a public choice perspective, however, this analysis fails to appreciate that once rights have been forcibly taken from one individual or group, other individuals and groups may similarly have their rights dismissed, so that effectively all rights are abolished. Hence, while 'the common man' may benefit in the short-term from the destruction of the rights of the once-privileged, in the long-term such action takes away protection from predation from every individual, rich and poor.

Second, it has been argued that Buchanan's proposal is simply impractical. Lehner (1983) has contended that Buchanan's own work on the dynamics of collective decision-making suggests that it will be impossible to reach consensus among a heterogeneous population on an issue of such high importance as the rules that determine the distribution of property rights. Accordingly, it is said that, 'Given this situation, a consensual and fundamental renegotiation of property rights is most unlikely to occur' (Lehner 1983: 442).

It would clearly be extremely naïve to suggest that a constitutional revolution of the kind envisaged by Buchanan can be easily imagined taking place in contemporary capitalist societies. But institutional arrangements that seemed irrevocably locked-in have been suddenly swept away – as was the case in Eastern Europe in 1989. Although the requirement of unanimity makes agreement more costly and more difficult compared to non-unanimous agreement, it also means that agreement must be 'thinner' – as noted in Section 3 unanimity implies agreement on the allocation of basic rights and the decision-making rules to be used in post-constitutional, non-unanimous decisions. What does seem clear, however, is that a prerequisite of a constitutional revolution would be a revolution in popular perceptions of the role and purpose of politics. It would be necessary to re-imagine politics as a consensual rather than a conflictual enterprise.

The principle of unanimity does not simply entrench the status quo nor automatically lead to an argument for minimal, laissez-faire government. Rather, public choice offers a means of normatively evaluating contemporary capitalist societies against the ideal of unanimity. This normative evaluation exposes the weak legitimacy of the institutional arrangements that exist in such societies. Buchanan's solution is not the top-down imposition of more limited government, but a constitutional revolution in which a new social contract would be unanimously agreed. Hence, Buchanan's work can be seen to provide a radical solution to the problems of unconstrained government and historic injustice, rather than a conservative defence of the status quo.

## **6 Conclusion: power and public choice**

This article has argued that public choice theory provides a robust account of power in contemporary capitalist societies. Public choice recognizes that economic inequalities will exist in any advanced capitalist economy and that inequalities of power will inevitably follow from these inequalities of income and wealth. However, it is argued that such inequalities of resources and of power may be legitimate if the processes via which they arise have unanimous consent.

Constitutional agreement is understood to limit power by establishing rights applicable to all that may be enforced by collective authority. These rights impose restrictions on what may be done to any individual, including the prohibition of the taking of a person's property without their consent – whether via violent predation or compulsory taxation (Buchanan 1975a: Chapter 4; Buchanan 1977c).

This idealized conception of politics and markets provides a challenge to the legitimacy of contemporary capitalist societies that have not been founded upon the principle of unanimity and where rights are not effectively protected. In this respect, public choice challenges the legitimacy of institutional arrangements in contemporary capitalist societies, rather than providing the crude justification of the status quo alleged by its critics.

Public choice and its critics utilize two incommensurable conceptions of politics. Public choice theorists conceptualize politics as a consensual enterprise, which means that the consent of all – privileged and unprivileged – must be attained for collective decisions (including consent to the use of non-unanimous decision-making rules). Public choice theorists therefore refuse to accept that any one person's utility is more or less important than any other's utility. As Buchanan (1977c: 15) has written: 'in thinking about men we are morally obliged to proceed as if they are equals, in that no man counts for more than another'. What follows from this, uncomfortable as it undoubtedly is for some, is that the well-being of a rich individual is no more or less important than the well-being of a poor individual. Similarly, the well-being of a hereditary beneficiary of historic injustice is no more or less important than the well-being of those who have not enjoyed similar hereditary good fortune.



By contrast, the critics of public choice advocate non-consensual politics – politics in which the rights of some individuals may be destroyed for the benefit of others. Indeed, Barry (1965), Dugger (1979), Rae (1975) and Shapiro (1996) explicitly acknowledge that they support non-consensual politics because it enables one group (the deserving poor) to confiscate the resources of another group (the undeserving rich). For Shapiro (1996: 49), ‘politics is fundamentally about the possession and dispossession of power’, so that the moral enterprise of politics is said to involve deciding which group should exercise power over others.

From a public choice perspective, it is not legitimate to trade-off the utility of one individual or group for the utility of another, even if according to some moral criteria some individuals or groups are judged more deserving than others. Moreover, once the rights of some people have been taken away, then the rights of all are effectively destroyed; once it has been established that one person’s property can be taken without his or her consent, then the same principle can be applied to any person’s property. In this respect, in non-consensual politics the Hobbesian war of all against all that people sought to escape by entering into political agreement, ‘is simply transferred to the realm of institutionally organized conflict’, so that, ‘politics is a continuation of war by other means’ (Buchanan and Congleton 1998: 19).

Empirical work in public choice also challenges the assumption that the beneficiaries of non-consensual politics will be the deserving poor and the losers will be the undeserving rich (even assuming that such categories are sound). Public choice scholarship has shown that the political process is liable to capture by organized, privileged interest groups rather than by unorganized, unprivileged individuals and groups (Becker 1983; Crain, Tollison and Deaton 1991; Olson 1965; Olson 1982). Moreover, once the assumption of benevolent political actors has been relaxed then non-consensual politics becomes a licence for organized groups to undertake predatory action against others – whether rich or poor (Buchanan and Tullock 1962; Buchanan 1975a; Olson 1982). Hence, it is the critics of public choice who advance a naïve and inadequate account of power that offers no more than the continual predation of some against others. By contrast the public choice account of power

offers a means to legitimize and limit power and therefore is superior to that advanced by its critics.

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